No. 12,229

IN THE

United States Court of Appeals

For the Ninth Circuit

KAM KOON WAN, on his own behalf and on behalf of all other persons and employees of defendant who are similarly situated,

Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian corporation,

Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR E. E. BLACK, LTD., APPELLEE.

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BRIEF FOR E. E. BLACK, LTD., APPELLEE.

OPINION BELOW.

The opinion of the District Court on the motion for partial summary judgment is reported in 75 F. Supp. 553, and is found in the record on pages 35-66; the opinion on the coverage of the Fair Labor Standards Act is unreported and appears in the record on pages 76-86.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii is founded upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended, 48 U.S.C. Section 642; and upon paragraph 24 of the Judicial Code, 28 U.S.C. Sec. 41 (8).

The jurisdiction of this Court rests upon Title 28, United States Code, Section 1291, and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended, 48 U.S.C. 642.

PROCEEDINGS BELOW.

This is an action brought by employees against their employer for overtime pay and liquidated damages under the Fair Labor Standards Act of 1938.[1] The complaint was filed on November 14, 1945, and sought recovery for a period of six years prior thereto. Answer admitting some and denying others of the allegations of the complaint was filed on March 27, 1946 (R. 11). Thereafter motions to intervene were filed joining additional employees as parties plaintiff (R. 11-18). An amended answer was filed on January 31, 1947 (R. 22) asserting that defendant had paid the overtime required by the Fair Labor Standards Act after November 10, 1943, and setting up as defenses the territorial statute of limitations[2] and that the

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[1] 52 Stat. 1060, 29 U.S.C. Sec. 201 et seq.

defendant was acting in compliance with military orders in paying wages during the period from December 7, 1941, to October 24, 1944. On August 13, 1947, defendant moved to amend its answer further by alleging that conformity with and reliance upon the orders of the military governor was in good faith and that the action was barred for the period after December 7, 1941, by the provisions of the Portal-to-Portal Act of 1947, 29 U.S.C. Sec. 258. The motion was granted, and a second amended answer was filed on August 26, 1947 (R. 30).

Motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure was filed, together with supporting affidavits, on August 13, 1947 (R. 24-30). Plaintiff and intervenors filed no counter-affidavits.

After extensive argument, the District Court rendered its opinion on February 5, 1948 (R. 35), in which it granted the motion with respect to the period December 7, 1941, to November 10, 1943, on the ground that a defense under Section 9 of the Portal-to-Portal Act of 1947 had been established. It further granted the motion for the period November 10, 1943, to the date of filing of the action, November 14, 1945, on the ground that there was no violation of the Fair Labor Standards Act of 1938. The motion was denied for the period November 14, 1939, to December 7, 1941, on the ground that the territorial statute of limitations was not applicable.

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[2]Act 174, S.L. Hawaii 1945.

Plaintiffs filed a motion for rehearing on March 11, 1948, which motion was denied on May 13, 1948 (R. 68).

The parties stipulated as to the work performed by defendant between November 14, 1939, and December 7, 1941 (R. 69-76). On August 12, 1948 (R. 86), the District Court ruled that certain of the work described in the stipulation was covered and that other jobs were not covered.

Partial summary judgment, and judgment for certain of the plaintiffs for back pay and penalties were entered on January 20, 1949 (R. 87-95).

Notice of appeal was filed by plaintiffs on February 15, 1949 (R. 96), the appeal being based on asserted error in upholding the defense under the Portal-to-Portal Act of 1947 in the ruling on the motion for summary judgment, and in failing to find that certain work as described in the stipulation was covered by the Fair Labor Standards Act of 1938.

STATUTES AND ORDERS.

The pertinent provisions of the Portal-to-Portal Act of 1947, and the text of certain military orders appear in the Appendix.

STATEMENT OF FACTS.

The complaint alleged that defendant E. E. Black, Ltd., was engaged in a general construction business (R. 3), that defendant employed plaintiffs in various capacities for the period of six years next preceding the filing of the complaint (R. 4), and that defendant failed to pay plaintiffs overtime compensation pursuant to the Fair Labor Standards Act of 1938 (R. 4-5). Plaintiffs prayed for judgment awarding them the overtime compensation due them, and an equal amount as liquidated damages, together with costs and attorney's fees (R. 6).

Defendant's final amended answer (R. 30-35) set up five defenses:

(1) That the complaint failed to state a claim upon which relief could be granted;

(2) That none of the plaintiffs was covered by the Fair Labor Standards Act of 1938;

(3) That since November 10, 1943, defendant had paid overtime compensation in the amount required by the Fair Labor Standards Act of 1938;

(4) That the wages paid by defendant between December 7, 1941, and November 10, 1943, were paid in conformity with orders of the military governor in Hawaii, and that defendant conformed with and relied upon these orders in good faith;

(5) That the action was barred by the territorial statute of limitations.

The District Court sustained the third defense, that overtime had been paid as required by the Fair Labor Standards Act since November 10, 1943 (R. 42), and this determination is not before this Court on appeal.

The District Court overruled defendant's contention that plaintiffs were barred by the territorial statute of limitations (fifth defense) for the period November 14, 1939, to December 7, 1941, and this determination also is not before this Court.

The questions raised by the appeal involve the second defense, relating to coverage, and, more importantly, the fourth defense concerning the application of the Portal-to-Portal Act of 1947, to defendant's reliance upon the orders of the military governor, and the plaintiffs' contention that the Portal-to-Portal Act of 1947, is unconstitutional.

The work done by defendant during the period November 14, 1939, to December 7, 1941, is listed and described in the stipulation of the parties (R. 69-76). These facts are undisputed, and raise only questions of law concerning the coverage of the Fair Labor Standards Act of 1938.

The defense raised under Section 9 of the Portal-to-Portal Act of 1947, was sustained on motion for summary judgment. The facts from which the District Court drew its conclusions are undisputed, either appearing in uncontroverted affidavits filed by defendant, or being judicially noticed by the Court, or being admitted in the pleadings.

Defendant was engaged in a general construction business for the United States, the Territory of Hawaii, the City and County of Honolulu, and private individuals (R. 3, 31). From December 7, 1941, to and including November 10, 1943, work by defendant under contracts with various agencies of the United States constituted not less than 80% of the total work done during that period (R. 25).

Military government obtained in Hawaii from December 7, 1941, to October 24, 1944 (R. 36). The military governor had "the full support of the Secretary of War" (R. 48, 52).

The military governor issued orders regulating the hours, rates of pay, and overtime compensation of all employees who were subject to military control (R. 26). Employees of defendant were subject to such control (R. 26, 28). Defendant was obliged to pay the wages and overtime compensation required by the military orders (R. 26, 29); violations of the orders were punishable by provost court as it saw fit (R. 37). The schedule of wages imposed by the military governor set a standard for the payment of overtime compensation to all employees subject thereto (R. 38). Defendant conformed in all respects to the wage schedules and rates of overtime compensation prescribed by the military governor (R. 26). Defendant's conformity with the military orders was in good faith, and in reliance on said orders (R. 26). On November 1, 1943, the military governor promulgated an order which changed the prior standard for overtime compensation and adopted the same standard which was

embodied in the Fair Labor Standards Act (R. 48; see Appendix C).

Based upon the above undisputed facts, the District Court found:

(1) That the questions presented were ones which could properly be decided on motion for partial summary judgment (R. 44);

(2) That defendant had "pleaded and proved" its defense under Section 9 of the Portal-to-Portal Act of 1947 (R. 45-46);

(3) That defendant conformed to and relied upon the orders of the military governor in good faith (R. 47-48);

(4) That the military orders were within the meaning of "regulation, order, ruling, approval, or interpretation" in the Portal-to-Portal Act of 1947, and that the War Department acting through the military governor, was an "agency of the United States";

(5) That the Portal-to-Portal Act of 1947, as applied, was constitutional.

Plaintiffs appealed from every part of this ruling as well as from the District Court's application of the Fair Labor Standards Act of 1938 to certain work as described in the stipulation.

QUESTIONS PRESENTED.

1. Can a District Court determine the validity of a defense under Section 9 of the Portal-to-Portal Act of 1947 on motion for summary judgment where the facts before it are not in dispute?

2. Did the District Court reasonably conclude that appellee had conformed with and relied upon an administrative regulation or order of an agency of the United States in good faith from the undisputed facts before it?

3. Is the Portal-to-Portal Act of 1947, constitutional as applied to these appellants?

4. Are employees engaged in new construction or in construction of an addition to a non-commercial part of a military base covered by the Fair Labor Standards Act of 1938?

SUMMARY OF ARGUMENT.

The Portal-to-Portal Act of 1947 is remedial legislation to be liberally construed. The requirement in Section 9 that a defense based thereon must be pleaded and proved does not preclude the use of the summary judgment as provided for in the Federal Rules of Civil Procedure provided there is no genuine issue as to a material fact.

On a motion for summary judgment, when the facts are not in dispute, the Court can and should make inferences of ultimate fact. This is true where the

inference to be drawn is one of good faith. The failure of appellants to file any counter-affidavits on the motion for summary judgment was an admission of the truth of the facts in appellee's affidavits.

On the uncontroverted facts presented to the District Court, the Court had no alternative but to find that appellee conformed with and relied upon the military orders in good faith. The phrase "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938 * * *" contained in General Orders No. 91, did not put appellee on notice that in complying with the order it was violating that Act. Irrespective of notice, appellee was in good faith in conforming with the military orders where any other action would subject it to punishment by the military authorities. No reasonable man would have acted otherwise.

Appellants cannot now bring forth facts which are alleged to show lack of good faith when they failed to do so before the trial Court. There are no facts in the record upon which a finding of lack of good faith could be based.

The orders of the military governor were administrative regulations or rulings within the meaning of the Portal-to-Portal Act. That they were orders of an executive department does not change their administrative character. The purposes of the Portal-to-Portal Act and the cases decided thereunder make it clear that this sort of order is within the purview of the Act.

The military governor was an agency of the United States within the meaning of accepted definitions of the word in other statutes. The term should be construed in the light of the remedial purposes of the Act. In fact, it has been construed in other cases to include offices similar to that of the military governor.

Congress has the power under the Constitution to provide a defense to statutory rights which it created even though the rights be thought to have accrued before the passage of the Act. And Congress has the power also, in the regulation of interstate commerce, to remove burdens from that commerce, even though vested, contractual rights are affected thereby.

New construction of facilities which may at some future time be devoted to commerce does not bring employees engaged in such construction within the coverage of the Fair Labor Standards Act. Construction of an addition to an existing facility remotely connected with instruments which might conceivably be used in commerce is not "commerce" or "the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

ARGUMENT.

I. CONSTRUCTION OF THE PORTAL-TO-PORTAL ACT.

A. The Act should be liberally construed.

Section 9 of the Portal-to-Portal Act of 1947 (see Appendix A) provides in part:

> In any action * * * commenced prior to or on or after the date of the enactment of this Act

> * * * no employer shall be subject to any liability * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation * * * *such a defense,* if established, shall be a bar to the action * * *. (Emphasis supplied.)

Appellants take the position that this section establishes an "exemption" to the Fair Labor Standards Act.[3] This is deceiving. It is, as the section itself states, a defense. The use of the label "exemption" calls forth immediately associated ideas of narrow literal construction. Appellants then use the associated ideas as a springboard to a conclusion that the words "plead and prove" in Section 9 of the Act must be construed to require in every instance a full-fledged trial on Section 9 defenses, and to prohibit the use of summary judgments under Rule 56 of the Federal Rules of Civil Proceure. This logical device was a much abused trick in the sophist's bag. The entire line of reasoning depends on the accuracy of the term "exemption." In making use of this restrictive term, appellants ignore the purposes of the Act, as indicated by the congressional findings. After enumerating ten evils to be corrected or avoided by the Act, the Congress stated in Section 1(b):

> It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collec-

[3]Appellants' Brief, pp. 17-18.

tive bargaining; and (3) to define and limit the jurisdiction of the courts. (29 U.S.C. Sec. 251.)

That the legislation is remedial cannot be doubted after an examination of the findings and policy of the Congress as stated in the Act.

Instead of an "exemption", Section 9 creates a remedial defense, to be construed just as broadly to effect the purposes of the Act as the rights under the Fair Labor Standards Act. An entirely different set of rules of construction than that propounded by appellants is called into play.

Applying the rules concerning remedial legislation, Courts have consistently construed the Portal-to-Portal Act liberally.[4] As was said in the *Cochran*[5] case:

> In order to remedy a situation that they (Congress) in their wisdom thought required remedial legislation, they went much further—I think all parties will concede this—than they had ever gone in the enactment of legislation which dealt with a situation similar to the one we have here.
>
> The Act is notoriously remedial; and it is neither to be construed niggardly nor to be administered with obvious hostility to its plain meaning and language.[6]

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[4] *Burfeind v. Eagle-Picher Co.*, 71 F. Supp. 929 (1947); *Cochran v. St. Paul & Tacoma Lumber Co.*, 73 F. Supp. 288 (1947); see also Anno. 3 A.L.R. (2d) 1097, 1122.

[5] 73 F. Supp. 288, 289 (1947).

[6] *McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716, 731 (1948).

B. The Act does not preclude summary judgments in favor of those asserting Section 9 defenses.

In the light of the above basis for construction, does the language of Section 9 of the Act, placing the burden of proof on the employer with respect to defenses there created by requiring him to "plead and prove" the defense, deny the employer the right to move in an appropriate case for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure? We submit it does not.

Rule 56(a) allows parties seeking to recover to move for summary judgment, and 56(b) extends the right to defending parties. Defendants having the burden of proof,[7] as well as plaintiffs, are entitled to the relief in appropriate cases where no genuine issue as to a material fact has been brought to the attention of the Court. In such a case, Rule 56(c) requires that "The judgment sought shall be rendered forthwith." No exception is made in the rule. "They govern all proceedings in actions brought after they take effect."[9]

Proof for purposes of the Portal-to-Portal Act must be construed to mean such proof as is declared to be satisfactory for the Federal Courts by the rules of procedure duly promulgated by the Supreme Court. The rights of litigants to trials of material facts are preserved. Absent any material issue, only a question of law is presented to the Court. Facts brough

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[7]See: *Dillard v. Thompson*, 5 F.R.D. 26 (1945); *Pen-Ken Oil and Gas Corp.*, 2 F.R.D. 355 (1942).

[8]*Creel v. Lone Star Defense Corp.*, 171 F. (2d) 964 (CA 5th 1949).

[9]F.R.C.P., Rule 86.

before the Court, if uncontroverted, are "proved" within the meaning of the rules of procedure and within the meaning of the Portal-to-Portal Act. Had Congress intended to prevent the applicability of the federal rules to the defense established by Section 9 of the Act, clearer language distinguishing this type of proof from that required in other cases in the federal courts should certainly have been used.

Appellants rely on two cases decided by this Court before the promulgation of the federal rules.[10] In *United States v. Lindholm,*[11] this Court held that a state summary judgment law conflicted with the Tucker Act requiring proof satisfactory to the Court because—

> * * * the federal judge * * * finds himself debarred from proceeding with the case under any adopted rules and denied access to any satisfactory proof of the claim * * *.

Strict construction of a statute waiving sovereign immunity required that the federal judge determine for himself what proof was or was not satisfactory. Here, as above stated, canons of strict construction are not applicable. In addition the Supreme Court, by the promulgation of the rules, has declared that the summary judgment procedure affords adequate proof in all federal causes.

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[10] *United States v. Lindholm*, 79 F. (2d) 784 (CCA 9th 1935), followed in *United States v. Stevenson*, 79 F. (2d) 788 (CCA 9th 1935).

[11] 79 F. (2d) 784, 787 (CCA 9th 1935).

Provided that the case otherwise warranted the partial summary judgment, the Portal-to-Portal Act, Section 9, does not preclude the award thereof in this case.

II. THE ISSUE OF GOOD FAITH WAS PROPERLY DETERMINED ON UNCONTRADICTED AFFIDAVITS IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT.

The appellee proved, by the affidavit of J. M. Stevens (R. 25, 26) that it was subject to regulation by the Office of the Military Governor in Hawaii after December 7, 1941, and that it was in fact regulated with respect to wages, hours, and working conditions by General Orders issued by that office. And, swears Mr. Stevens, appellee—

> * * * was obliged to obey the commands of the Military Authorities with respect to the payment of wages, hourly rates and overtime, and the release and discharge of employees employed by it during said period, and that said defendant at all times and in all respects has, in good faith, followed the military orders, wage schedules, payment of overtime and wage practices as prescribed and ordered by said Military Authorities. (R. 26-27.)

Appellants filed no counter-affidavits denying these sworn assertions of fact. In failing to do so, they admitted the facts contained in appellee's affidavits.[12]

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[12] "Plaintiffs filed no counter-affidavits. I gather from their brief, although they do not specifically so state, that they rely on the presence in the case of genuine issues of fact as the reason for denial of defendant's motion. However, in the light of plaintiffs'

The instant case thus differs significantly from *Halsband v. Fuller Co.*,[13] wherein the Court held that summary judgment would not lie in view of counter-affidavits filed by plaintiff, even though defendant's affidavits were more numerous and complete. The Court rightly held that the credibility of affiants cannot be tried on the motion.

The duty of the District Court was to apply the objective test of whether the appellee acted as a reasonable and prudent man in paying wages pursuant to the military orders, and whether there were any circumstances which should have put appellee on notice that in so doing it was violating the Fair Labor Standards Act of 1938.[14]

And the question now before this Court, in the language of the Court of Appeals for the Fifth Circuit, is—

> whether a fair and impartial tribunal reasonably could have inferred from the uncontroverted facts[15]

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admission arising from their failure to file counter-affidavits, I find there are no issues of fact remaining." *Allen v. Radio Corporation of America*, 47 F. Supp. 244, 245 (1942); see also, as to effect of failure to file counter-affidavits, *Geller v. Trans America Corp.*, 53 F. Supp. 625 (1943); *Farley v. Abbetmeier*, 114 F. (2d) 569 (USCA, DC 1940); *Hornbeck v. Dain Mfg. Co.*, 7 F.R.D. 605 (1947); *Creel v. Lone Star Defense Corp.*, 171 F. (2d) 964 (CA 5th 1949).

[13]119 N.Y.L.J. 901 (1948); 14 Lab. Cas. par. 64,387, cited in Appellants' Brief, p. 23.

[14]Interpretive Bulletin, Administrator, Wage and Hour Division, Sec. 790.15, 12 F.R. 7662, November 18, 1947, Part 790, Tit. 29, Ch. V, C.F.R.

[15]*Creel v. Lone Star Defense Corp.*, supra.

that appellee acted in good faith in reliance upon and in conformity with the General Orders of the Military Governor.

In addition to challenging the merit of the District Court's determination of the above question, appellants question his power to decide it.

In Section I-B above, we discussed appellants' first ground for urging a lack of power in the District Court, namely, that the provisions of the Portal-to-Portal Act required a full scale trial of this issue.

Appellants urge, as a second ground for finding a lack of power in the District Court, the theory that "good faith" is an "ultimate" and "final" fact not to be established by affidavits. The *Divins* case[16] is relied upon for this proposition, although it must be noted that the Court in that case recognized that good faith can "in rare instances" be established by affidavits.

It is difficult to conceive of a case presented on uncontroverted facts where a judge will not be required to draw an inference of ultimate fact. Questions have often arisen on motions for summary judgment which require the determination of an ultimate fact; such questions as whether a person is an independent

[16] *Divins v. Hazeltine Electronics Corp.*, 79 F. Supp. 513 (1947), cited in Appellants' Brief, p. 23.

contractor,[17] and questions of intention,[18] fraud,[19] duress,[20] and reasonableness and good faith.[21]

In the *Creel* case, supra, the Court said, at page 968, that:

> * * * wherever we turn in this case, we are confronted with the ultimate fact, established by the finding of the court below, that appellee was not an independent contractor. To ignore this fact would be to disregard Rule 56, which was promulgated by the Supreme Court. A reasonable inference fairly deducted from an uncontroverted fact or number of facts may establish the existence of an ultimate fact which entitled one of the parties to judgment as a matter of law.

To the same effect is the statement of the Court in the *Fox* case, supra:

> Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when the conclusion is one to be drawn by the court. (pp. 736-7.)

Appellants point to the fact that they have been unable to locate any cases other than the instant case where summary judgment was granted on a Section 9 defense. This, it is said, is significant to note.

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[17] *Creel v. Lone Star Defense Corp.*, supra.
[18] *Fox v. Johnson & Wimsatt*, 127 F. (2d) 729 (USCA, DC 1942).
[19] *Geller v. Trans America Corp.*, 53 F. Supp. 625 (1943); cf. *Peckham v. Ron Rico Corp.*, 7 F.R.D. 324 (1947).
[20] *Farley v. Abbetmeier*, 114 F. (2d) 569 (USCA, DC 1940).
[21] *Dickheiser v. Penn. R. Co.*, 5 F.R.D. 5 (1945).

Such significance as might be contained in that fact is dissipated by the cases where summary judgment has been awarded. Thus, in *Blessing v. Hawaiian Dredging Co.*,[22] defendant having shown by affidavit that it relied in good faith on rulings of the Chief of the Bureau of Yards and Docks, Navy Department, summary judgment in its favor was granted. In at least two other cases, summary judgment was used in sustaining a defense under Section 9 of the Act.[23] The rarity of a situation where affidavits filed in support of a motion for summary judgment are allowed to remain completely uncontroverted accounts for the scarcity of cases on the precise question.

Appellants challenge the completeness of the affidavits filed in support of the motion to establish the defense.[24] Of course, the legal sufficiency of the facts to support the inference drawn by the District Court is the question now before this Court. But appellants apparently argue that the facts are not detailed enough even if legally sufficient. Had appellants desired, they could have utilized the extensive discovery procedures of the Federal Rules of Civil Procedure to obtain additional facts. If they desired, even after argument on the motion, they could have sought delay in entry of the judgment so as to permit them to obtain facts upon which to base a counter-affidavit.[25]

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[22]76 F. Supp. 556 (1948).

[23]*Chernick v. Johnson Drake & Piper Inc.*, 121 N.Y.L.J. 1814, May 20, 1949, 16 Lab. Cas. par. 65,187; *Gordon v. White Construction Co.*, 121 N.Y.L.J. 1949, June 1, 1949; 16 Lab. Cas. par. 65,174.

[24]Appellants' Brief, pp. 20, 21, 25.

[25]*Peckham v. Ron Rico Corp.*, 7 F.R.D. 324 (1947).

In this connection it should be noted that although the Court ruled on the motion for summary judgment on February 5, 1948, (R. 58) the entry of partial summary judgment was delayed until January 20, 1949, (R. 88) and the final judgment was entered the same day. (R. 89). One counter-affidavit, containing any facts which might tend to create an inference of lack of good faith, would have been enough[26] so long as it amounted to more than a "mere denial, unaccompanied by any facts."[27]

Appellants are not excused for their failure to deny the good faith established by appellee's affidavits by saying that the matters of fact upon which a counter-affidavit might be based lie within the exclusive knowledge of appellee.

In the first place, all the circumstances were known by everyone engaged in the construction business in Hawaii after December 7, 1941, and the bases for the objective test of reasonableness and lack of notice were readily available. If there were facts which should have put appellee on notice (other than the wording of the General Orders hereafter discussed) appellants could marshal them and put them in an affidavit. If the District Court, or even appellants, wanted more facts from appellee, the latter could have provided supplemental affidavits.[28] No request was made.

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[26]*Halsband v. Fuller Co.*, 119 N.Y.L.J. 901 (1948); 14 Lab. Cas. par. 64,387.

[27]*Piantadosi v. Loews, Inc.*, 137 F. (2d) 534 (CCA 9, 1943).

[28]Rule 56(e), F.R.C.P.: "* * * The court may permit affidavits to be supplemented * * * by further affidavits."

Secondly, even if the matter were thought to be in the exclusive knowledge of appellee, it is clear that appellants must so state in an affidavit, together with a statement of what facts are referred to, and what discovery procedures had been taken to elicit them.[29]

On the basis of the record before it, the District Court was required to grant the motion for summary judgment, provided that the facts before it supported a fair inference that appellee relied in good faith on an administrative ruling of the type specified in Section 9 of the Act.

III. THE UNCONTROVERTED AFFIDAVITS SUPPORT THE FINDING OF THE DISTRICT COURT THAT DEFENDANT RELIED UPON AND CONFORMED WITH AN ADMINISTRATIVE REGULATION OF AN AGENCY OF THE UNITED STATES IN GOOD FAITH.

A. Good faith.

Heretofore we have examined the question whether the District Court had the power to determine that appellee acted in good faith on the basis of the uncontroverted affidavits filed in its behalf. Assuming that the power exists and could properly be exercised in a case such as this, was the inference of good faith which the District Court drew from the undisputed facts a reasonable one?

Appellants say that the inference drawn by the District Court was not reasonable, and advance the following arguments:

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[29] *Hartmann v. Time, Inc.*, 64 F. Supp. 671 (1946).

(1) The military orders were not applicable to appellee (Brief, pp. 26-31);

(2) The appellee was put on notice that it was violating the Fair Labor Standards Act by the phrase contained in General Orders No. 91 (R. 62) that—

> Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938,[30] * * *. (Brief, pp. 34-38);

(3) The appellee's course of conduct prior to December 7, 1941, and after November 10, 1943, shows that it did not rely in good faith on the military orders (Brief, p. 39).

The first contention, that the military orders were not applicable to appellee, is not open to appellants. The affidavits (R. 24-30) make it abundantly clear that the military orders regulating wages were applicable and applied to appellee, and the District Court so found (R. 40, 44). The question is not how the military orders should be construed, but rather how were they construed by the military governor. This is a question of fact. Appellants cannot allow the fact to stand uncontroverted in appellee's affidavits, and then attempt to raise an issue for the first time in its brief on appeal.[31]

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[30]As noted by the District Court this phrase "was not in General Orders No. 38 nor in any of the other orders affecting labor —even General Orders No. 10 (New Series) until the final order, No. 40 (New Series)". (R. 37).

[31]*Allen v. Radio Corporation of America*, 47 F. Supp. 244, 245-6 (1942): "Plaintiffs endeavor to raise one in their brief by arguing that the exhibits attached to the affidavit of defendant's

Did the phrase "Nothing herein * * * etc." put appellee on notice that it was violating the Fair Labor Standards Act? Perhaps the best answer to this question is that given by the District Court (R. 48). It makes no difference that the military governor paid lip service to outstanding federal statutes when, as a matter of fact, he commanded appellee to comply with his edicts under threat of punishment.[32] Is there a possible inference of bad faith to be drawn from compliance with the rules of the highest authority in the Territory, which rules had the force of law and carried criminal sanctions? Surely this is not a situation where appellee was voluntarily choosing the regulation most favorable to him.[33] No one knew then that the military governor was exercising usurped and invalid authority. This was not decided until the Supreme Court decision three years later.[34] And that case does not hold that the military governor had no authority to regulate the wages and hours of employees during the years 1941 to 1943. In addition, the order itself, after requiring the payment of certain straight and overtime rates, stated—

> Nothing herein shall be construed as * * * in conflict with the provisions of the Fair Labor Standards Act of 1938 * * *.

General Orders No. 91 (R. 63) was clear in providing for payment of one and one-half the regular rate for

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expert do not corroborate his statements * * *. Rule 56, it seems to me, does not contemplate the raising of an issue of fact for the first time in a brief of counsel * * *."

[32]See General Orders No. 4, R. 60.

[33]Cf. Appellants' Brief, pp. 36-37.

[34]*Duncan v. Kahanamoku*, 327 U. S. 304 (1946).

overtime in excess of *forty-four* hours. There was no room for construction of this requirement. It was clear on its face. But it was not to be "construed" to conflict with the Fair Labor Standards Act of 1938 which, it now appears, required payment for overtime after forty hours. The "Nothing herein" clause was in reality a declaration by the military governor that General Orders No. 91 did not conflict with the Fair Labor Standards Act with respect to those persons whose wages were established by it. That is why the same standards were laid down in General Orders No. 10 (Appendix B) although the "Nothing herein" clause was not incorporated in that order.

This interpretation is supported by the ruling issued by the acting administrator to the agent in Hawaii in charge of the Wages and Hour Division of the United States Department of Labor (R. 39). The agent participated in the military governor's control of labor. The ruling was that if the Fair Labor Standards Act of 1938 were not suspended, workers performing labor pursuant to martial law might be considered exempt as government employees. The District Court treated this fact as "interesting but non-usable" (R. 42). However, it was placed before the Court in affidavit to show, not that appellee relied on this radiogram for purposes of a Section 9 defense, but to demonstrate that the "Nothing herein * * *" clause was not designed to preserve the application of the Fair Labor Standards Act to the employees covered by the General Order, but rather was an interpretation by the military governor that his regula-

tions were perfectly consistent with the Fair Labor Standards Act. His labor experts had been authoritatively advised that these workers were exempt. Indeed, it has been held, and we submit properly so, that where employers were forced to comply with administrative rulings, even though they admittedly knew that the rulings were contrary to those of the administrator of the Wage and Hour Division, they had acted in good faith.[35] This matter of compliance and reliance will be taken up again below. But it is clear that an employer in such circumstances does not pick "one of the rulings on which to rely" and choose "the ruling that is most favorable to his, the employer's interest."[36] The Portal-to-Portal Act protects persons who were misdirected and misled by their government, so that they were brought into violation of law. If the employer is protected by voluntary good faith reliance on administrative rulings, it would be a mockery of the law and the defense to deny its protection to an employer who in good faith had no alternative but to violate the Fair Labor Standards Act.

The third contention advanced by appellants to show that the District Court erred in finding that appellee acted in good faith is that appellee's violation of the Fair Labor Standards Act before December 7, 1941, and its compliance with the requirements of that act after November 10, 1943, while it was still under

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[35]*Curtis v. McWilliams Dredging Co.*, 78 NYS (2d) 317 (1948), 119 N.Y.L.J. 744.

[36]See language of Congressman MacKinnon, 93 Cong. Rec. Part IV, p. 4391, May 1, 1947; Appellants' Brief, p. 36.

military orders negative an inference of good faith reliance on the orders during the period December 7, 1941, to November 10, 1943.

The record is clear (R. 25) that appellee paid appellants at the rate of time and one-half for all work in excess of forty hours per week after November 10, 1943, except for two clerical employees (R. 25) and the District Court so found (R. 42). As the Court said (R. 42):

> November 10, 1943, it will be recalled, marked the date on and after which it was possible incidentally to meet the requirements of the Fair Labor Standards Act as well as to obey the military orders.

General Orders No. 91 (R. 62-66) and General Orders No. 10, dated 10 March 1943 (Appendix B) both required payment of time and one-half the regular rate for hours in excess of forty-four in one week. General Orders No. 40 (New Series) dated 1 November 1943 (Appendix C) changed the foregoing and required that employees—

> * * * shall be paid overtime at the rate of one and one-half the regular rate, for overtime in excess of forty (40) hours per week * * *.

Thus for the first time, compliance with the military orders became tantamount to compliance with the Fair Labor Standards Act. Appellants' argument (Brief, pp. 39-40) that compliance with the Fair Labor Standards Act after November 10, 1943, conclusively shows no good faith reliance on the military

orders prior thereto, proceeds on the erroneous assumption that the substance of the orders was the same up to the cessation of the military government on October 24, 1944. It was not. The change in orders with General Orders No. 40, *supra,* brought the military interpretation in line with the now accepted interpretation of the Fair Labor Standards Act. Continued reliance upon and compliance with the orders brought about eventual admitted compliance with the federal law.

Appellants point out that there was no showing of a change in payment of overtime when appellee first came under the military orders (Brief, p. 21), and then argue that violations prior to December 7, 1941, demonstrate that there was no good faith reliance on military orders after that date. Here again, appellants are ignoring the summary judgment procedure. After appellee filed its affidavit it was incumbent upon appellants to bring before the Court other facts which might have shown a lack of good faith. Additional facts could have been called for by appellants[37] and the lack of additional facts could have been stated by appellants in affidavits even though they did not have facts at hand to controvert good faith.[38] Instead, appellants slept on their rights, invited the District Court to take an action which they now assert was error and, in their brief, attempt to raise a question whether, if additional facts had been brought out, an issue with respect to good faith reliance would have

[37]*Peckham v. Ron Rico Corp.,* supra.
[38]*Hartmann v. Time, Inc.,* supra.

been made out.[39] Such action converts a device of judicial simplification and economy into an instrument of complication and delay. It frustrates the purpose of the summary judgment procedure.

The question of good faith before December 7, with respect to violations found by the Court to have taken place in that period, was not urged upon the Court. The hearings subsequent to the decision on the motion for partial summary judgment were devoted to coverage.

Bearing on the "history of previous violations"[40] the cases are clear that both the War[41] and Navy[42] Departments took the view that cost-plus-fixed-fee contractors were not subject to the Fair Labor Standards Act.

Had appellants thought that additional facts had come out from which an inference of bad faith could be drawn, it was their duty, in the hearings subsequent to the decision on the motion for summary judgment, to bring such facts to the attention of the Court. The matter of additional evidence and its effect was before the District Court in a hearing on January 14, 1949 (R. 115-122), but at no time did appellants seek, by affidavit or evidence, to prove that actions prior to December 7, 1941, showed a lack of good faith, and the matter was not urged upon the Court, although the summary judgment was not entered on the Court's

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[39]See *Allen v. Radio Corporation of America,* supra.
[40]Appellants' Brief, p. 37.
[41]*Curtis v. McWilliams Dredging Co.,* supra.
[42]*Kenney v. Wigton-Abbott Corp.,* 80 F. Supp. 489 (1948).

decision until January 20, 1949 (R. 87), the decision having been rendered on February 5, 1948 (R. 35).

The only reasonable inference to be drawn by the District Court from the facts before it was that appellee relied in good faith upon the military orders.

B. Reliance.

The phrase "Nothing herein * * *" contained in General Orders No. 91 (R. 62) did not serve to put appellee on notice that it was violating the Fair Labor Standards Act. Irrespective of the effect of this phrase, however, it is firmly established in the record that the military orders required appellee to pay overtime compensation at a certain rate under pain of punishment. This fact alone establishes the defense under Section 9 of the Act. Should appellee have risked trial by a military tribunal, and taken the matter before a Court to test the validity of the military governor's regulation of wages? An employer does not carry such a burden under the Act. If he acted as a reasonable and prudent man would have acted under the circumstances he is in good faith.[43]

Would a reasonable and prudent employer in 1941 or 1942 or 1943, during the early days of the war, doing war work under Army supervision on islands known to be vulnerable to attack, have dared to refuse to comply with orders issued by the military governor? And such compliance cannot be distinguished

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[43]Interpretive Bulletin, 12 F.R. 7655, Part 790, Tit. 29, Labor, Chap. V, Sec. 790.1-790.29, C.F.R.

from reliance as required by Section 9. As the administrator has said, "regulations" and "orders" refer to rulings having the binding force of law, and requiring compliance.[44] Nor does subsequent determination of invalidity affect prior reliance on the regulation.[45] Section 9 provides that a judicial determination that a regulation is invalid or of no legal effect does not prevent a defense based thereon from barring an action.

The situation presented here is much the same as that before the Court in *Curtis v. McWilliams Dredging Co.*[46] where the War Department required the payment of a wage scale which violated the Fair Labor Standards Act. On February 19, 1943, Executive Order 9301 was promulgated, containing virtually the same "Nothing herein * * *" clause as General Orders No. 91. Thereafter, on May 13, 1943, the War Department issued a circular letter providing for payment of overtime not in compliance with the Fair Labor Standards Act. The War Department considered the Executive Order and

> believed that Circular Letter 2390 complied with the Presidential proclamation; and that the Fair Labor Standards Act did not apply.

The employer wrote to the War Department stating that the Fair Labor Standards Act allowed overtime to his employees, but the War Department forbade the

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[44]Ibid., Sec. 790.17 (b).

[45]Ibid., Sec. 790.17 (h); see *Duncan v. Kahanamoku*, supra, which does not, however, go so far as to hold the labor regulations invalid.

[46]78 NYS (2d) 317 (1948), 119 N.Y.L.J. 744.

payment thereof. On the issue of good faith reliance, the Court said:

> And, indeed, what was there for the defendants to do? The plaintiffs suggest that there was an absence of good faith on the defendant's part * * * As between the administrator and the War Department, obviously, the defendant had to abide by the rulings of the department with which it was dealing. It could not with impunity act in defiance of those rulings. To repeat the language of the President in approving the Portal-to-Portal Act, the defendants have met "an objective test of actual conformity with an administrative ruling or policy".[47]

IV. THE ORDER OF THE MILITARY GOVERNOR WAS A REGULATION, ORDER, RULING, APPROVAL, OR INTERPRETATION OF ANY AGENCY OF THE UNITED STATES WITHIN THE MEANING OF SECTION 9 OF THE PORTAL-TO-PORTAL ACT.

A. The military orders were administrative regulations, etc., within the meaning of the Portal-to-Portal Act.

Appellants attempt to distinguish between "executive" orders such as those issued by the military governor, and "administrative" orders contemplated by Section 9. Nevertheless, they urge the Court to apply the definition of "agency" contained in other statutes, and mention, among others, the Federal Register Act.[48] This act, far from distinguishing between executive and administrative functions, defines "agency" as

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[47]78 NYS (2d) 317, 328 (1948); this court held Section 9 unconstitutional. The latter holding was reversed on appeal and judgment directed for defendant on April 7, 1949. 16 Lab. Cas. par. 65,101.

[48]44 U.S.C., Sec. 304; see Appellants' Brief, p. 46.

> the President of the United States, *or any executive department,* independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the government of the United States, but not the legislative or judicial branches * * *. (Emphasis supplied.)

This definition was referred to by the Wage and Hour administrator in his Bulletin of November 18, 1947.[49] Executive orders and rulings are specifically included therein. In passing, it may be well to note that the Federal Register Act definition is far more apt to the problems of the Portal-to-Portal Act than the more limited definition of the administrative Procedure Act.[50] Canons of liberal construction are applicable. All agencies were being defined, just as all agencies are covered by Portal-to-Portal Act, whereas only such agencies were covered by the Administrative Procedure Act whose structure would permit codification of their procedure.

Under the above definition, appellants are clearly in error when they would exclude the War Department from the definition of agency.[51]

Jackson v. Northwest Airlines, Inc.,[52] does not affect the conclusion that the military orders are administrative for purposes of the Portal-to-Portal Act. The contracting officer of the Air Corps in that case was merely determining operations under the contract

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[49]Supra, Sec. 790.19.
[50] 5 U.S.C., Sec. 1001.
[51]Appellants' Brief, p. 46.
[52]76 F. Supp. 121 (1948).

which he had entered into for the government. And all he undertook to do was reimburse the company should it be held to have violated the Fair Labor Standards Act. Here was no regulation of wages. The real question in that case was whether the interpretation by the Chairman of the Railway Labor Board could be considered a Board or Agency interpretation.

In a number of instances, efforts by executive departments to regulate wages have been held to constitute defenses under the Act, even though the executive departments concerned were not issuing regulations ancillary to an existing executive order or statute so much as exercising a regulatory power on the assumption that no executive order or statute was applicable. This is true of rulings by the War Department[53] and Navy Department, Bureau of Yards and Docks.[54] These regulations were "executive" regulations within the meaning of appellants' definition, but there was no doubt in the mind of the Courts that they were also administrative regulations within the meaning of the Portal-to-Portal Act.[55] So, too, were the orders of the military governor, issued from an agency of the United States,[56] which regulated the payment of wages by employers of the class to which appellee belonged on

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[53]*Curtis v. McWilliams Dredging Co.*, supra.

[54]*Blessing v. Hawaiian Dredging Co.*, 76 F. Supp. 556 (1948); *Kenney v. Wigton-Abbott Corp.*, supra.

[55]Apparently this was clear also to Representative Gwynne, the sponsor of the Act in the House of Representatives, for he remarked that "This good faith provision extends to any administrative order * * * of any department of the executive branch of the government * * *." Cong. Rec., January 2, 1947, p. 1545.

[56]See infra, IV-B.

the assumption that the Fair Labor Standards Act was not applicable. It is idle to say that the principle of protection against government misregulation contained in the Portal-to-Portal Act is not applicable because the War Department is an "executive department" rather than an "administrative agency". The reasons for protection are the same as if the regulation were that of the War Labor Board[57] or, indeed, of the Wage and Hour Division itself.

B. The military government was an agency of the United States within the meaning of the Portal-to-Portal Act.

The District Court found

> that despite its probable unlawful nature, despite exceeding its jurisdiction, these things were done by the Army with the full support of the War Department (R. 52).

Nevertheless, appellants seek to go behind this finding of fact to urge that

> the Military Governor was not actually vested with final authority to speak as the War Department * * *.[58]

We have already shown that the War and Navy Departments were "agencies" within the meaning of the Portal-to-Portal Act, and that the Bureau of Yards and Docks under the Navy Department was likewise such an agency.[59] It is not required that rul-

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[57]See *Brueshke v. Joshua Hendy Corp.*, 14 Lab. Cas. par. 64,266 (1947).

[58]Appellants' Brief, p. 48.

[59]Supra, footnotes 53 and 54.

ings be made by the Secretary of the Navy, or the Chief of Naval Operations.[60] The War Department "supported" the military governor in issuing his orders regulating the wages, hours, and working conditions of labor.[61] These were orders of the highest authority, having the force of law.

It matters not that the tenure of the military governor was subsequently held to be unlawful,[62] for subsequent determinations of invalidity do not affect prior reliance.[63] Furthermore, the *Duncan* case did not hold that the military governor had no power to regulate wages in the Territory during the years 1942-43.

By what theory, then, can this action by the United States government, through its agency, be differentiated from other actions so that the remedial provisions of the Portal-to-Portal Act should not be applied? The War Department is an agency. It supported and approved the actions of the military governor. Wages paid by appellee were regulated by orders issued by that office. Appellee complied and conformed with, and relied upon, those orders. As a result of such conformity, appellee has now been sued for additional compensation by a number of its employees.

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[60]Cf. suggestion in Appellants' Brief, pp. 44-45.

[61]In fact, the military governor received the President's support with respect to labor regulation. See e.g., items (5) and (6), Appendix D.

[62]*Duncan v. Kahanamoku*, supra.

[63]Interpretive Bulletin, November 18, 1947, 12 F.R. 7655.

Appellants rely heavily on the Administrative Procedure Act, which contains a definition of "agency".[64] We have already pointed out that this definition is more limited in scope than that contained in the Federal Register Act.[65] The latter act applies to all "agencies", as does the Potal-to-Portal Act. The Administrative Procedure Act applies to agencies which can be conveniently grouped to have their procedures codified.[66] In addition, the remedial purpose of the Portal-to-Portal Act, protecting employers against government misguidance, is better served by applying a definition broad enough to cover all agencies of the government. As indicated by the Federal Register Act, an "agency" is every office of the government of the United States "but not the legislative or judicial branches".

The exceptions to the Administrative Procedure Act are not effective to show that whatever was excepted from that Act was excepted also from the Portal-to-Portal Act. The Administrative Procedure Act is used only as one of several guides to construction.

Nevertheless, in answer to appellants, we say that the military government was not in fact the government of the Territory, nor the *alter ego* thereof. It was a government agency which exerted the power to

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[64]5 U.S.C., Sec. 1001.

[65]44 U.S.C., Sec. 304.

[66]For instance, Section 1001(a) excludes from the definition of "agency" certain "agencies composed of representatives of the parties", but nevertheless makes all the excluded agencies including military commissions subject to Section 1002 which required all agencies to publish their rules in the Federal Register.

supersede the Territorial government. It exercised an entirely executive, administrative power. No legislature, and no judiciary participated. It exercised quasi-legislative and quasi-judicial powers just as do most other government agencies, but without the benefit of Court review save by habeas corpus. Clearly the military governor acted differently than the Territorial government. He was not the repository of the latter's powers.[67] He cannot be equated with it for purposes of statutory construction.

As to appellants quoting General Richardson (the military governor) to show that Hawaii was a "combat zone"[68] and therefore he was exercising military authority "in the field in time of war or in occupied territory * * *,"[69] we need only point to the opinions in the *Duncan* case. Justice Black says:[70]

> We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory * * *.

Mr. Chief Justice Stone's concurring opinion[71] effectively lays to rest the suggestion that Hawaii was a "combat zone" by pointing to the fact that—

> the record here discloses no such conditions in Hawaii, at least during the period after February 1942, and the trial court so found.

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[67]See *Duncan v. Kahanamoku*, supra.
[68]Appellants' Brief, p. 48.
[69]Administrative Procedure Act, 5 U.S.C. 1001 (a) (3).
[70]327 U. S. 304, 314.
[71]327 U. S. 304, 335-337.

We submit that the term "agency" in the Portal-to-Portal Act should be broadly construed, and is broad enough to cover the War Department acting through the military governor.

Even if the narrow definition of the Administrative Procedure Act is adopted, the military government of Hawaii, had it been legally constituted, would have been covered. And the illegality of the agency is immaterial to the question of a Section 9 defense.

V. SECTION 9 OF THE PORTAL-TO-PORTAL ACT IS CONSTITUTIONAL.

The argument advanced by appellants, that they cannot be deprived of their rights to overtime pay, characterized as vested, by a subsequently enacted statute, has been urged upon many Courts and always overruled. The defenses given to employers by Sections 2, 9 and 11 of the Act have uniformly been held valid and constitutional. The contention is so without merit in the light of the decided cases that we do no more here than call the attention of the Court to a few of the leading cases on the question.[72] Other District Court cases, too numerous to mention, have reached the same result. The result is the same whether the rights of employees are considered statutory or contractual.[73]

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[72]*Darr v. Mutual Life Ins. Co.*, 169 F. (2d) 262 (CCA 2d 1948), cert. den. 335 U. S. 871 (1948); *Rogers Cartage Co. v. Reynolds*, 166 F. (2d) 317 (CCA 6th 1948); *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58 (CCA 4th 1948).

[73]See *Darr v. Mutual Life Ins. Co.*, supra, and *Battaglia v. General Motors Corp.*, 169 F. (2d) 254 (CCA 2d 1948).

VI. THE RULINGS OF THE DISTRICT COURT WITH RESPECT TO COVERAGE WERE CORRECT.

Two questions are raised by this appeal as to whether activities of appellee prior to December 7, 1941, were covered by the Fair Labor Standards Act:

(1) Is new construction of facilities which might be used for commercial purposes covered by the Act?

(2) Is construction for the government on a military reservation "commerce" or "the production of goods for commerce"?

In our opinion, the District Court correctly answered the foregoing questions in the negative.

Appellants have not contested the District Court's determination with respect to new construction[74] except with regard to new construction of:

servicing landing mat, Fourteenth Naval District;

concrete radio shelters, Army;

new wharf at Port Allen, Kauai;

new wharf for Inter-Island Steam Navigation Company;

new pier and shed for the same company;

new substations at Hickam Field for Mutual Telephone Co.;

new trenches for Hawaiian Electric Co., and Honolulu Gas Co.[75]

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[74]See Interpretive Bulletin No. 5, par. 12, October 1940, CCH, LLR par. 24,179.

[75]Appellants' Brief, pp. 52-53.

In asserting that the above construction is covered by the Act, appellants rely on the *Ritch* case, decided by this Court in 1946.[76] That case held that employees of a dredging company engaged in dredging channels in navigable waters were covered, even though the channels had been used exclusively by Navy vessels. It was reasoned that Navy vessels serve some commercial purposes. This decision is clearly sound. It is now well established that employees engaged in improvement or reconstruction of interstate facilities are covered by the Act. This is true of dikes[77] and bridges.[78] It is also true as to the reconstruction of highways.[79]

Appellants argue that "new construction of an instrumentality of commerce does constitute commerce within the meaning of the Act."[80] It is asserted that the above listed jobs would be instrumentalities of commerce when completed and that they are therefore covered by the Act.[81] This conclusion is demonstrably erroneous.

By the stipulation filed as to work performed prior to December 7, 1941 (R. 69-76), all of the contested rulings of the District Court with respect to coverage involve new facilities. There is no question of recon-

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[76]Ritch v. Puget Sound Bridge and Dredging Co., 156 F. (2d) 334 (CCA 9th 1946).

[77]*Walling v. Patton-Tulley Transportation Co.*, 134 F. (2d) 945 (CCA 6th 1943).

[78]*Engebretsen v. E. J. Albrecht Co.*, 150 F. (2d) 602 (CCA 7th 1945).

[79]*Walling v. McCrady Construction Co.*, 156 F. (2d) 932 (CCA 3d 1946).

[80]Appellants' Brief, p. 52.

[81]Ibid., p. 53.

struction or improvement of, addition or extension to, interstate facilities.

The sole question posed as to coverage, then, is whether new construction of facilities which may, upon completion, be used in interstate commerce, is covered by the Act.

Where a drydock fronting on a navigable stream is being constructed, the workers engaged therein are not covered by the Act.[82]

So too, the construction of a new factory to be devoted to commerce[83] and the construction of a graving dock and adjacent channel and waterfront at Roosevelt Roads in Puerto Rico[84] are not covered. The question is not what the ultimate use of the buildings or objects constructed will be, but whether *they have already been* in some way a facility or instrument of commerce.

The decisions are analyzed and this distinction carefully drawn by Judge Augustus M. Hand in *Scholl v. McWilliams Dredging Co.*[85] There he says—

> The difficulty, however, with treating the plaintiff as covered by the Act is that his work did not relate to repair or even to reconstruction of an existing instrumentality of commerce but to completely new construction. (p. 732.)

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[82]*Brue v. Steers, Inc.*, 60 F. Supp. 668 (1945).
[83]*Kelly v. Ford, Bacon & Davis*, 162 F. (2d) 555 (CCA 3d 1947).
[84]*Nieves v. Standard Dredging Corp.*, 152 F. (2d) 719 (CCA 1st 1945).
[85]169 F. (2d) 729 (CCA 2d 1948).

Distinguishing the *McCrady, Ritch* and *Patton-Tully* cases[86] Judge Hand went on to say:

> These decisions, however, expressly stressed that the work was upon instrumentalities which had already been used in interstate commerce, distinguishing the construction of new installations which had not been devoted to commerce before. (p. 732.)

In view of the foregoing, the District Court was manifestly sound in deciding that the new construction of facilities which might one day be devoted to commerce is not covered by the Act.

The one job which may not have been new construction governed by the foregoing authorities was:

> additions to the battery charging distribution system at the submarine base, Pearl Harbor. (R. 69.)

There is nothing in the stipulated facts which would bear out the assumption of appellants that this charging system had ever been or would be devoted to commercial purposes. Submarines use electric power while submerged. Except for very recent developments, the submarines were unable to recharge their batteries under water. An essential part of a submarine base, then, is a plant for recharging batteries.

Adding to such a plant is entirely local construction. Even assuming that submarines could be used occasionally for commercial purposes, the plant which charges their batteries for undersea operations could

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[86]Supra, footnotes 76, 77 and 79.

not be so used. Granting that dredging of the channel at Pearl Harbor might have been covered, even though the harbor were used entirely by naval vessels,[87] this reasoning is not equally applicable to construction of the naval base built on the harbor. While the harbor and channel may have been navigable waters and instruments of commerce, it is clear that the military reservation was not. It was to be used for the multitude of operational, administrative and supply functions with which naval shore bases served the fleet in time of war, and was far removed from any commercial activity. The District Court was right in ruling that the addition to the battery-charging distribution system was not "commerce" nor "the production of goods for commerce."[88]

CONCLUSION.

This case could arise nowhere but in Hawaii, for only in Hawaii was the Army area commander authorized by the War Department to take such authority and issue such orders as those upon which appellee relied here. Nevertheless, this type of order created a situation which Congress found it imperative to remedy by the passage of the Portal-to-Portal Act. An

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[87]Cf. *Ritch v. Puget Sound Bridge and Dredging Co.*, supra, footnote 76.

[88]*Divins v. Hazeltine Electronics Corporation*, 163 F. (2d) 100 (CCA 2d 1947), and see: *Crabb v. Welden Bros.*, 65 F. Supp. 369 (1946), affirmed as to point here involved, 164 F. (2d) 797 (CCA 8th 1947); *Walling v. Craig*, 53 F. Supp. 479 (1943); *McLeod v. Threlkeld*, 319 U. S. 491 (1943).

employer under the jurisdiction of the War Department and the military governor (whether rightfully or wrongfully seized) pays his employees in reliance upon and in conformity with orders of the military governor. The District Court correctly held that Congress constitutionally could protect employers from government misdirection as it tried to do in the Portal-to-Portal Act of 1947, and that the protection applied to appellee who acted in good faith in reliance upon orders of the military governor. We submit that the judgment appealed from should be affirmed.

Dated, Honolulu, Hawaii,
September 1, 1949.

Respectfully submitted,
J. GARNER ANTHONY,
WILLIAM F. QUINN,
Counsel for Appellee.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendices A, B, C and D Follow.)

Appendices.

Appendix A

PORTAL-TO-PORTAL ACT OF 1947, 29 U.S.C., PAR. 258.

Sec. 9. *Reliance on Past Administrative Rulings, Etc.*

In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Appendix B

10 March 1943

GENERAL ORDERS No. 10
Labor

1. Policy.
2. Registration.
3. Employment.
4. Wages.
5. Hours of Work and Overtime.
6. Use of Labor.
7. Appeal Agency.
8. Child Labor.

1. *Policy.*

1.01. The following policies are announced for th information and guidance of employers employing th services of (a) employees of the United States unde the War Department or the Navy Department; (b workers employed on construction and other project under the War Department or the Navy Department (c) stevedores and other workers employed on dock and dock facilities; and (d) employees of public util ties. The same policies shall be equally applicable t employees of the above-mentioned employing agencie

2. *Registration.*

2.01. Any person, now or hereafter employed b any of the employers to whom reference is made i

Paragraph 1.01, and who ceases to be so employed, shall, within two (2) days after ceasing to be so employed, register or re-register with the nearest office of the United States Employment Service.

2.02. Every employer described in Paragraph 1.01 shall notify the nearest office of the United States Employment Service on Form USES-(H)1, prescribed by the United States Employment Service, of any employee added to such employer's payroll and on Form USES-(H)2, prescribed by the United States Employment Service, of any employee dropped from such employer's payroll, within two (2) days thereafter.

2.03. Any person, firm, or corporation who violates, refuses, fails or neglects to comply with any of the provisions of Paragraphs 2.01 and 2.02 above, upon conviction thereof, shall be fined not more than One Thousand Dollars ($1,000.00), or be imprisoned for not more than one (1) year, or both.

3. *Employment.*

3.01. Employers described in Paragraph 1.01 may maintain their own labor recruiting facilities.

3.02. The United States Employment Service hereby is designated as the central employment agency for the distribution of civilian labor hereby required to register, and shall allocate labor in the fulfillment of employers' requisitions in accordance with priorities established by the Office of the Military Governor.

3.03. No employer described in Paragraph 1.01 shall employ or offer to employ an individual for-

merly, now, or hereafter in the employment of other such employers, unless and until such individual shall have presented to the employing agency a bona fide release without prejudice, on Form USES-(H)2, from his last previous employer or from the Director of Labor Control, and evidence of registration on Form USES-350, or Form USES-506.

3.04. Any individual, who is, has been, or hereafter shall be, employed by any employer described in Paragraph 1.01, who presents himself to any other such agency and secures or attempts to secure employment without having a bona fide release without prejudice from his last previous employer, or from the Director of Labor Control, or in any way misrepresents his employment status with regard to such release, shall upon conviction, be fined not more than two hundred dollars ($200.00), or be imprisoned for not more than two (2) months, or both.

3.05. Any employer or employer's agent who shall cause any individual to be employed in contravention of Paragraph 3.03 hereof, shall, upon conviction, be fined not more than two hundred dollars ($200.00), or be imprisoned for not more than two (2) months, or both.

4. *Wages.*

4.01. Revised Wage Schedule No. 9, dated 3 May 1942 and effective at the beginning of the first payroll period after 3 May 1942, hereby is designated as the standard wage scale for workers engaged in work on construction and other projects under the War D

partment or the Navy Department. No person seeking work or employed on construction or other projects under the War Department or the Navy Department shall be employed at a rate less than, or in excess of, the standard rate for the job as listed in Wage Schedure No. 9, and as same may be revised from time to time as approved by the Military Governor.

4.02. Federal agencies under the War Department or the Navy Department shall continue their regularly established wage schedules.

5. *Hours of Work and Overtime.*

5.01. Normal work week for employees on construction and other projects under the War Department or the Navy Department shall be six (6) days of eight (8) hours each. The maximum number of hours worked in any seven (7) consecutive days shall not exceed fifty-six (56), except in cases of emergency and with the approval of the Chief of Military or Naval Service concerned.

5.02. Normal work week for employees of the United States under the War Department or Navy Department shall conform to applicable Federal regulations.

5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate for overtime in excess of forty-four (44) hours per week, or in excess of eight (8) hours in any one day. Double the regular rate will be paid for work performed on the seventh consecutive work

day. One and one-half the regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day.

5.04. Paragraph 5.03 above shall not apply to employees who are in a supervisory capacity on a monthly salary basis.

5.05. Employees of the United States under the War Department and the Navy Department shall be paid overtime in accordance with applicable Federal regulations.

5.06. For employees engaged on construction and other projects under the War Department and the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime and no overtime shall be paid for Sunday except when it is worked consecutively in excess of six (6) days.

5.07. The provisions of any contract between individual employees, labor unions, and employers engaged on construction and other projects under the War Department or the Navy Department, in conflict with the provisions of this General Order hereby are suspended.

6. *Use of Labor.*

6.01. Terms of labor contracts between individuals and employers engaged on construction and other projects under the War Department or the Navy Department which restrict or specify the nature of work to be performed, hereby are suspended.

6.02. Any person now or hereafter employed by ny employer described in Paragraph 1.01 hereof shall eport regularly to the job to which he is ordered by aid employer.

6.03. Employers and employers' agents described n Paragraph 1.01 are directed to refrain from dis- riminatory practices toward employees with regard releases or other matters relating to termination of mployment.

6.04. No employer or employer's agent shall fail r refuse to abide by the decisions of the Director of abor Control on any matters within the meaning of aragraph 6.03.

6.05. Any person, firm, or corporation who or hich violates, refuses, fails, or neglects to comply ith any of the provisions of Paragraphs 6.01 to 6.04 iclusive, or who or which evades or attempts to evade ny of the provisions of said Paragraphs 6.01 to 6.04, iclusive, upon conviction thereof, if a natural person, all be punished by confinement, with or without ard labor, not to exceed two (2) months, or by a fine ot to exceed two hundred dollars ($200.00), or by th such confinement and fine, or, if a corporation or ther than a natural person, by a fine not to exceed o hundred dollars ($200.00).

7. *Appeal Agency.*

7.01. Persons discharged with prejudice from em- ployment with employers mentioned in Paragraph 1.01 hereof, may appeal their cases to the Appeal Agency, Office of the Director of Labor Control, for decision

as to whether or not they may be allowed to continu work with another employer.

7.02. The Director of Labor Control, Office of th Military Governor, hereby is designated as the Appea Agency for persons discharged with prejudice by em ployers described in Paragraph 1.01. Any individua not satisfied with the decision of the Appeal Agenc may appeal his case to the Labor Control Board of th Military Governor.

8. *Child Labor.*

8.01. Employers described in Paragraph 1.01 sha comply with the provisions of Section 18 of Chapte 259-B of the Revised Laws of Hawaii 1935, as enacte by Act 237 of the Session Laws of Hawaii 1939, a amended by Act 319, Session Laws of Hawaii, Regu lar Session 1941.

By order of the Military Governor of the Territor of Hawaii.

Thomas H. Green
Brigadier General, A.U.
Executive

Appendix C

TERRITORY OF HAWAII

OFFICE OF THE MILITARY GOVERNOR
IOLANI PALACE
HONOLULU, T.H.

1 November 1943

ENERAL ORDERS)
No. 40)

AMENDMENTS TO GENERAL ORDERS

1. AMENDMENTS TO GENERAL ORDERS NO. 10, THIS FFICE, 10 MARCH 1943.

1.01. Paragraph 1.01, Title 1, General Orders No.), this office, 10 March 1943, hereby is amended to ead as follows:

"1.01. The following policies are announced for the formation and guidance of employers employing the rvices of (a) employees of the United States under e War Department or the Navy Department; (b) orkers employed on construction and other projects nder the War Department or the Navy Department;) stevedores and other workers employed on docks nd dock facilities; and (d) employees of public utili-es. The same policies shall be equally applicable to nployees of the above-mentioned employing agencies. othing herein shall be construed as superseding or conflict with the provisions of the Fair Labor tandards Act of 1938 or the Walsh Healey Public ontracts Act."

1.02. Paragraph numbered 2.01, Title 2, Genera Orders No. 10, this office, 10 March 1943, hereby i amended to read as follows:

"2.01. Any person now or hereafter employed b any of the employers to whom reference is made i Paragraph 1.01 and who ceases to be so employe shall, within two (2) days after ceasing to be so em ployed, register or re-register at the nearest office c the U. S. Employment Service and shall not accep employment with any other employer in the Territor of Hawaii, regardless of whether such employer is c is not an employer described in Paragraph 1.01, unt so directed by the U. S. Employment Service."

1.03. Paragraph numbered 2.02, Title 2, Genera Orders No. 10, this office, 10 March 1943, hereby amended to read as follows:

"2.02. Every employer described in Paragraph 1.(shall notify the nearest office of the United Stat Employment Service on Form 14-E, Section of Labo Control, Office of the Military Governor, of any em ployee dropped from such employer's pay roll, withi two (2) days thereafter."

1.04. Paragraph numbered 3.03, Title 3, Gener Orders No. 10, this office, 10 March 1943, hereby amended to read as follows:

"3.03. No employer described in Paragraph 1.(shall employ or offer to employ an individual forr erly, now, or hereafter in the employment of oth such employers, unless and until, such individual sha have presented to the employing agency a bona fi

release, without prejudice, on Form 14-E, Section of Labor Control, Office of the Military Governor, from his last previous employer, or from the Director of Labor Control and evidence of referral on Form USES 508."

1.05. Paragraph numbered 4.01, Title 4, General Orders No. 10, this office, 10 March 1943, as amended by Paragraph numbered 1.01, General Orders No. 24, this office, 18 June 1943, hereby is amended to read as follows:

"4.01. Revised Wage Schedule No. 9, (Fourth Re-Issue), dated 1 November 1943, and effective at the beginning of the first pay roll period after 1 November 1943, hereby is designated as the standard wage scale, except as noted in Paragraph 4.03, for workers engaged in work on construction and other projects under the War Department or the Navy Department and employers of such other employees as may be designated from time to time by the Military Governor. No persons seeking work or employed on construction or other projects under the War Department or the Navy Department, or with other employers designated by the Military Governor, shall be employed at a rate less than, or in excess of, the standard rate for the job as listed in said Revised Wage Schedule No. 9, (Fourth Re-Issue), as now established or as the same may be revised from time to time as approved by the Military Governor."

1.06. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding to Title 4 of said

General Orders No. 10 a new paragraph to be numbered and known as Paragraph 4.03, Title 4, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

"4.03. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction or other projects under the War Department or the Navy Department relative to wages shall not be abrogated without the written consent of the individual."

1.07. Paragraph numbered 5.03, Title 5, General Orders No. 10, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Order No. 20, this office, 26 April 1943, hereby is amended to read as follows:

"5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate, for overtime in excess of forty (40) hours per week, or in excess of eight (8) hours in any one day, except as noted in Paragraphs 5.08 and 5.09. Where, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled workweek, a premium wage of double time compensation shall be paid for work on the seventh day. One and one-half regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day."

1.08. Paragraph numbered 5.06, Title 5, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"5.06. For employees engaged on construction and other projects under the War Department or the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of five (5) days."

1.09. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding to Title 5 of said General Orders No. 10, two new paragraphs to be respectively numbered and known as Paragraphs 5.08 and 5.09, Title 5, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

"5.08. Persons employed on construction or other projects under the War Department or the Navy Department in connection with derricks, dredges, drill rigs and tugs shall be paid overtime on the basis of one and one-half times the regular rate of pay for hours worked in excess of eight (8) hours in any one day or hours in excess of forty-eight (48) hours per week.

"5.09. The provisions of contracts, or extensions thereof, between individuals and employers engaged in construction or other projects under the War Department or the Navy Department relative to hours of work and overtime shall not be abrogated without the written consent of the individual."

1.10. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding thereto a new title and two new paragraphs to be respectively numbered and known as Title 9, General Orders No. 10, Office of the Military Governor, 10 March 1943, and Paragraphs 9.01 and 9.02, Title 9, General Orders No. 10 Office of the Military Governor, 10 March 1943, and to read as follows:

"9. SUBSISTENCE AND QUARTERS.

"9.01. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction and other projects under the War Department or the Navy Department relative to subsistence and quarters shall not be abrogated without the written consent of the individual.

"9.02. The practice of furnishing free board and lodging, or cash payment in lieu thereof, to persons employed locally or on new contracts shall be discontinued effective 1 November 1943."

By order of the Military Governor of the Territory of Hawaii:

/s/ Wm. R. C. Morrison
WM. R. C. MORRISON
Colonel, J. A. G. D.
Executive

A TRUE COPY:
/s/ Robert B. Griffith
ROBERT B. GRIFFITH
Major, Infantry

Appendix D

The several proclamations of the Governor of Hawaii, the President of the United States and the military governor of Hawaii and the military orders issued during the existence of martial law are all notorious facts in Hawaii, of which the District Court took judicial notice. They appear in the records of the District Court in prior cases and also appear in the records of this Court. For the convenience of the Court and counsel they are collected below:

(1) Proclamation of Governor J. B. Poindexter, dated December 7, 1941, declaring martial law (see Kahanamoku v. Duncan, 146 F. 2d 576, No. 10763, R. 56).

(2) Proclamation of Walter C. Short, assuming office of military governor dated December 7, 1941 (Kahanamoku v. Duncan, No. 10763, R. 58).

(3) Approval of proclamation of martial law by President Franklin D. Roosevelt, December 9, 1941 (Kahanamoku v. Duncan, No. 10763, R. 61-62).

(4) Proclamation of Governor Ingram M. Stainback, dated February 8, 1943 (Kahanamoku v. Duncan, No. 10763, R. 70-74).

(5) Letter of President Franklin D. Roosevelt, dated February 1, 1943, approving the proclamation of the governor of Hawaii dated February 8, 1943, and of the commanding general of the same date (Kahanamoku v. Duncan, No. 10763, R. 74-76).

(6) Proclamation of military governor dated Feb ruary 8, 1943 (Kahanamoku v. Duncan, No. 10763 R. 77-81). Under this proclamation certain jurisdic tion was relinquished by the military governor to th Governor of the Territory of Hawaii. Item (r) of thi proclamation provided for the relinquishment of:

> Control of the supply, employment, hours wages and working conditions of labor except a to (1) employees of the United States under th War Department or the Navy Department (2) workers employed on construction and othe projects under the War Department or the Nav Department; (3) stevedores and other worker employed on docks and dock facilities, and (4 employees of public utilities.
>
> It is contemplated that the commanding genera and the governor of Hawaii by mutual agreemen will appoint a joint advisory committee whic shall from time to time consult and advise wit each of them with reference to labor matters i their respective fields.

(7) General Orders No. 10, relating to labo (Kahanamoku v. Duncan, No. 10763, R. 208-214).

(8) Amendment to General Orders No. 10, rela ing to labor (Kahanamoku v. Duncan, No. 1076 R. 311-317).

(9) Proclamation of President Franklin D. Roos velt, terminating martial law, October 24, 1944 (Pro lamation No. 2627, 9 Fed. Reg. 12,831).